1990

Town of Manilla v. Broadbent Land Company : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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TOWN OF MANILA Plaintiff and Respondent v. BROADBENT LAND COMPANY Defendant and Appellant.	**BRIEF OF APPELLANT** **Case No. 900007**

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Interlocutory Appeal Pursuant to Rule 54(b) of the Utah Rules of Civil Procedure from Findings, Judgments and Orders of the Eighth Judicial District Court in and for Daggett County.

Honorable Dennis L. Draney,
District Judge

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LIST OF PARTIES

A. Designation of Plaintiff and Respondent.

The Plaintiff and Respondent is the Town of Manila.

B. Designation of Defendant and Appellant.

The Defendant and Appellant is Broadbent Land Company.

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JURISDICTION

This Court has jurisdiction to hear this appeal based on Article VIII of the Constitution of the State of Utah; Utah Code Ann. § 78-2-2(3)(j) (Repl. Vol. 9, 1987); Rule 54(b) of the Utah Rules of Civil Procedure, certifying the rulings and orders as final and appealable; and Rules 3 and 4 of the Rules of the Utah Supreme Court.

PROCEEDINGS BELOW

This is an appeal from the following findings, judgments and orders rendered by the Honorable Dennis L. Draney, of the Eighth Judicial District Court of Daggett County, State of Utah:

1. The Court's ruling dated September 8, 1989, and subsequent Order dated September 26, 1989, striking defendant's affirmative defenses 3 through 7 and dismissing the first cause of action of its counterclaim. (Record at 221 and 239-41).

2. The findings and order dated July 12, 1989, denying defendant's motion to dismiss. (Record at 145-51).

3. The findings and order dated July 12, 1989, granting plaintiff's motion for an order of immediate occupancy. (Record at 145-51).

These rulings and orders were certified as final appealable orders pursuant to Rule 54(b) of the Utah Rules of Civil Procedure in an order granting defendant's motion to certify dated December 5, 1989. (Record at 288-89) A Notice of Appeal was filed in the district court dated December 15, 1989. (Record at 292-93).

The trial court denied defendant's motion to dismiss based on claims that the town did not have the authority to condemn and that the Town of Manila had not followed the proper statutory procedures for condemnation. The court also granted the plaintiff's motion for an order of immediate occupancy. The defendant/appellant seeks to have the trial court's order reversed on the issue of the town's authority to condemn and to remand for a full hearing on the merits as to the issue of whether the Town has met the statutory requisites for condemnation.

ISSUES PRESENTED FOR REVIEW

Issue I

Whether the Town is prohibited from acquiring by condemnation, real property located outside of its corporate boundaries for a sewage lagoon.

Issue II

Whether municipalities classified as "Towns" are excluded from the delegation of the power to condemn under the Utah Constitution.

Issue III

Whether the statutory power to acquire a fee simple interest in real property is limited by statute to specific purposes which do not include the purpose presented here.

Issue IV

Whether the Town has failed to satisfy conditions precedent to condemnation.

Issue V

Whether the Town's right to condemn can finally be determined only after a trial on the merits.

STATEMENT OF THE CASE

A. Nature of the Case.

Action was brought in the Eighth Judicial District Court by the Town of Manila (hereafter "Town" and "Respondent"), to condemn land owned by Broadbent Land Company (hereafter "Broadbent" and "Appellant"), located in Daggett County, Utah. Following the filing of its Complaint, the Town moved for an Order of Immediate Occupancy pending a trial on the merits of the case. Broadbent filed a Motion to Dismiss challenging the Town's power to condemn.

B. Disposition in the Trial Court.

The Motions came on for hearing before the District Court on June 29, 1989. The Court received evidence and heard testimony only on those issues surrounding the Town's prima facie burden of proof on the Motion for an Order of Immediate Occupancy. The

Motion to Dismiss was argued based solely on the authorities cited in the Memorandums in Support of and in Opposition to the Motion to Dismiss. No evidence was received on the issue of the Town's power to condemn. This evidentiary issue was specifically reserved on the record for a trial on the merits. Following the hearing limited to the Order of Immediate Occupancy, the Court made its Findings of Fact and Conclusions of Law, granted the Motion for the Order of Immediate Occupancy and denied Broadbent's Motion to Dismiss.

On July 21, 1989, Broadbent filed an Amended Answer and Counterclaim raising various affirmative defenses. The Town subsequently filed a Motion to Strike the Affirmative Defenses and to dismiss several of the counterclaims on August 1, 1989. Broadbent filed a Memorandum in Opposition to the Motion to Dismiss the Counterclaim and to Strike the Affirmative Defenses on August 23, 1989. On September 8, 1989, the Court made a dispositive Ruling denying Broadbent's Motion to Strike the Town's Reply Memorandum and granting the Town's Motion to Strike Broadbent's Affirmative Defenses 3 through 7 and to Dismiss the First Cause of Action of Broadbent's Counterclaim.

Broadbent filed a Motion pursuant to Rule 54(b) of the Utah Rules of Civil Procedure requesting Judge Draney to Certify his

Findings, Rulings and Orders as Final and Appealable Orders as provided for in Rule 3(a) of the Rules of the Utah Supreme Court. Judge Draney granted Broadbent's Motion to Certify and an Order Granting the Motion was entered on December 5, 1989. Based upon the Order Granting the Motion to Certify, a Notice of Appeal was filed in the District Court dated December 15, 1989.

FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

1. The Town brought an action on or about March 22, 1989, to condemn Broadbent's real property for the installation and construction of a "total containment lagoon" for disposal of waste water and sewage. (Record at 1, ¶ 1). The Town then sought an order of immediate occupancy which was granted over Broadbent's objection. (Record at 9 and 149; transcript of hearing on Order of Immediate Occupancy, page 5-25).

2. The property which the Town has condemned is prime agricultural land adjacent to Flaming Gorge National Recreation Area, ("Property"). (Record at 126, ¶ 3).

3. The Property is located outside of the municipal boundaries of the Town of Manila and is in Daggett County. (Transcript of hearing on Order of Immediate Occupancy, page 19, lines 22-23).

4. This farmland is part of a larger contiguous parcel of land which is currently producing alfalfa. (Record at 126, ¶ 4; transcript of hearing on Order of Immediate Occupancy, page 213, lines 10-18).

5. The condemnation will take a minimum of thirty acres of prime agricultural farmland out of production. (Record at 127, ¶ 10; transcript of hearing on Order of Immediate Occupancy, page 155, lines 5-12).

6. The condemnation includes a one-thousand foot buffer zone surrounding the Property which cannot be used for any building purpose and which was not included in the Town's appraised value which was the basis for the required deposit paid into Court. (Transcript of hearing on Order of Immediate Occupancy, page 47, lines 15-25; page 48 lines 1-3; page 191 lines 4-24).

7. Furthermore, the total containment sewage lagoon will damage the value of the remaining Property. (Record at 127, ¶ 9). This severance damage is not included in the amount deposited with the Court by the Town. (Transcript of hearing on Order of Immediate Occupancy, page 43, lines 22-25).

8. The Property is unique given its proximity to the Flaming Gorge National Recreational Area because it is producing farmland in Daggett County which is largely barren. (Record at 127, ¶¶ 11-12).

9. Appellant was never asked nor given an opportunity to accompany an appraiser during any inspection of the Property. (Record at 126, ¶ 6; transcript of hearing on Order of Immediate Occupancy, page 194, lines 7-14).

10. Prior to the filing of the Complaint in this matter, neither Broadbent nor any other officer, agent or representative was given an offer of just compensation in any amount for the Property. (Transcript of hearing on Order of Immediate Occupancy, page 52, lines 18-22).

11. Prior to the filing of this action Broadbent was never given an appraisal or a written statement and summary in any amount as just compensation for the Property and/or damage to the remainder which will be caused by the condemnation. (Record at 126, ¶ 7; transcript of hearing on Order of Immediate Occupancy, page 41, lines 5-7; page 52 lines 23-25; page 61, lines 9-11; page 194, lines 15-24).

12. Broadbent has never been given any notice by the Town, nor any agent or representative of the Town, of the basic protections provided by the Utah Relocation Assistance Act (Utah Code Ann., §§ 57-12-1 et seq.). (Transcript of hearing on Order of Immediate Occupancy, page 41, lines 14-22; page 52, lines 4-17; page 62, lines 10-13). Furthermore, no other officer, agent or representative of Broadbent has been given such notice. (Record at 127, ¶ 8).

13. At least three alternative sites are available for the location of the lagoon. The alternative sites have fewer environmental problems and will be more economical to develop. (Record at 114-16; transcript of hearing on Order of Immediate Occupancy, page 206, lines 1-25; page 207, lines 1-12).

14. Alternative treatment processes are also available which can be located on the site of the existing treatment facility and which will not require the acquisition of additional land outside the boundaries of the Town or require a buffer area. (Transcript of hearing on Order of Immediate Occupancy, page 206, lines 1-25; page 207, lines 1-12). The alternative processes are also less costly. (Record at 114-16; transcript of hearing on Order of Immediate Occupancy, page 204, lines 4-25; page 204, lines 1-10).

15. The sewage lagoon has been identified as a possible threat to bird species which inhabit the area the Town seeks to condemn and occupy (Site #2). (Record at 118-19, ¶ 11 a - d).

SUMMARY OF ARGUMENT

Point I

The Town cannot acquire by condemnation, real property located outside of its corporate boundaries for a sewage lagoon. A municipal-owned sewer system is statutorily classified as an "improvement." Even if the town could be considered to be a city, which it cannot, a city's power to acquire property by

condemnation for an "improvement" as that term is defined by statute, is limited to property within its corporate limits.

Point II

The power of condemnation has not been specifically delegated by the Utah Constitution to municipalities classified by statute as "Towns." Manila has 800 or less inhabitants and is, therefore, a "town." The power of condemnation is conferred only upon cities by the Utah Constitution. The words "cities" and "towns" are mutually exclusive as used in Art. XI, § 5 of the Utah Constitution. Because Manila is classified as a town, it has no constitutional power of condemnation. The District Court erred in finding that the Town has the authority to condemn.

Point III

The statutory power to acquire a fee simple interest in real property is limited by statute to specific purposes. A sewage lagoon is not among the purposes for which fee title may be acquired. The power to condemn property must be derived from a statute which is to be strictly construed. The Constitution limits the delegation of the power by statute. Even if the Constitution extended the power to condemn property to towns,

which it does not, this statutory limitation on estates which may be taken would limit the town to acquiring an easement rather than fee simple title.

Point IV

The Town has failed to satisfy conditions precedent to condemnation. The Utah Relocation Assistance Act sets forth specific requirements which must be complied with by state or local governments prior to initiating condemnation proceedings when federal funds are used. The Town's Complaint failed to allege and show that it had complied with the policies of the Act. Additionally, the Town failed to comply with the statutory requirements for condemnation. The Town has never established that the taking of Broadbent's land was necessary for the construction of a sewage lagoon, nor that the construction and use of the property would commence within a reasonable time after initiation of condemnation proceedings. These conditions are statutorily required to be met before a taking.

The Town also failed to comply with the statutory requirements for its Order of Immediate Occupancy. Specifically, the Town failed to prove, by affidavit or otherwise, the damage which would accrue from the condemnation, and the reasons for

requiring a speedy occupation of Broadbent's land, all of which is required by statute.

Point V

The Town's right to condemn can finally be determined only after a trial on the merits. The court made its findings in the hearing on the Motion for an Order of Immediate Occupancy. The trial court never granted appellant a full evidentiary hearing on the Town's powers of condemnation. Utah law states that the right to condemn can finally be determined only after a trial on the merits, not at a hearing on a Motion for an Order of Immediate Occupancy. The trial court must be reversed and Broadbent allowed an opportunity for a trial.

ARGUMENT

Point I

THE TOWN CANNOT ACQUIRE BY CONDEMNATION, REAL PROPERTY LOCATED OUTSIDE OF ITS CORPORATE BOUNDARIES FOR A SEWAGE LAGOON.

Broadbent's Property, which is the subject of this condemnation, is located outside the corporate boundaries of the Town. The Property is located at some distance from the Town within the jurisdictional boundaries of Daggett County. In Point II of this brief, the argument is advanced that the Utah Constitution has not expressly conferred the power of condemnation upon towns. Without conceding the issue of whether the Town has the constitutional power to condemn, that power if any, cannot be extended beyond the corporate boundaries of the Town.

In Bertagnoli v. Baker, 215 P.2d 626 (Utah 1950), the issue on appeal was whether the Board of Education of Salt Lake City had been given the authority by the legislature to condemn land outside the limits of Salt Lake City for the purpose of constructing a school building. Under the facts of that case,

the property sought to be condemned was situated in part within the boundaries of Salt Lake City, and part within the boundaries of Salt Lake County. On review, the Supreme Court stated that boards of education have only such powers as are expressly conferred upon them by statute and such implied powers as are necessary to execute and carry into effect their express powers. In reviewing this power, the court noted that the right of eminent domain is in derogation of the rights of individual property owners and, therefore, has been strictly construed so that no person will be wrongfully deprived of the use and enjoyment of his property. The court found that the extra-territorial power of condemnation of property outside the district was not expressly granted by statute and that it could not be impliedly conferred. In reaching this decision, the court relied on the principle of law that statutes conferring the rights of eminent domain must be strictly construed in favor of the landowner.

The Supreme Court noted in Bertagnoli, several cases dealing with the extraterritorial extension of the power to condemn for the purpose of establishing waterworks. The Court noted that in those cases, it was impossible to locate a sufficient supply of water within the municipal limits. Noting the distinction between cities and towns in Point II, cities are

specifically granted extraterritorial control over waterworks in Utah Code Ann., § 10-8-15. This statute distinguishes among cities of the first class (100,000 or more inhabitants) and other classes. Cities of the first class have jurisdiction over the entire watershed. All other classes are restricted to an area fifteen miles from the point of diversion and for a distance of three hundred feet on each side of the stream.

The opposite analogy applies here. The Town currently has a sewage treatment plant within its corporate boundaries. The Town can retrofit, expand and modify this facility to meet its needs. Moreover, sufficient land exists within the boundaries of the Town to site a sewage lagoon. The cases cited in Bertagnoli, where the power of condemnation was extended beyond corporate limits for necessary purposes can, therefore, be distinguished on the facts.

Noting the distinction between the powers granted by the Utah Constitution to cities and towns as more fully described in Point II; Article XI, § 5(b) and (c) of the Constitution describes the power of condemnation conferred on cities with the following important differences:

> (b) To furnish all local public services, to purchase, hire, construct, own, maintain or operate, or lease public utilities local in extent and use; to acquire by condemnation, or otherwise, within or without the corporate limits, property necessary for any such purposes, subject to restrictions imposed by general law for the protection of other communities, and to grant local public utility franchises and within its powers regulate the exercise thereof.
>
> (c) To make local public improvements and to acquire by condemnation, or otherwise, property within its corporate limits necessary for such improvements; and also to acquire an excess over than [that] needed for any such improvement and to sell or lease such excess property with restrictions, in order to protect and preserve the improvement.

Under subparagraph (b) a city has authority to condemn property within or without its corporate boundaries; under subparagraph (c) a city may acquire property by condemnation only within its corporate limits.

Under Utah Code Ann., § 10-16-4, the legislature has categorized a municipal-owned sewer system as an "improvement": "(1) the governing body of any municipality shall have power to make or cause to be made any one or more or combination of the following improvements . . . (c) to construct, reconstruct, extend, maintain or repair . . . sewers . . ." .

It must also be noted that Utah Code Ann., §§ 78-34-1 et seq., the authority relied on by the Town in its Complaint, does not expressly extend the power of eminent domain outside the

boundaries of a political subdivision. Because a sewer system is a public improvement, only property located within the boundaries of a city may be acquired by condemnation for that purpose.

Article XI § 5(b) specifically restricts the purposes for which a city may exercise the power of condemnation beyond its corporate limits. Under the precedent established in Bertagnoli, the power to condemn property outside city boundaries is limited to those purposes specified and cannot be expanded by implication. Assuming, for the limited purpose of analysis and comparison, without acknowledging that the Town has been conferred the same powers as a city, the Town cannot condemn property located outside of its corporate boundaries for a sewage lagoon.

Point II

THE POWER OF CONDEMNATION HAS NOT BEEN SPECIFICALLY DELEGATED BY THE UTAH CONSTITUTION TO MUNICIPALITIES CLASSIFIED BY STATUTES AS "TOWNS".

A. The Classification of Towns.

Article XI, § 5 of the Utah Constitution provides:

> Corporations for municipal purposes shall not be created by special laws. The legislature by general laws shall provide for the classification of cities and towns in proportion to population, which laws may be altered, amended or repealed. Any incorporated city or town may frame and adopt a charter for its own government in the following manner: . . .

Repl. Vol. 41A, Utah Code Annotated (1953) (emphasis added).

In accordance with the first paragraph of Article XI, § 5, the legislature must classify cities and towns based upon population. It follows, therefore, that the legislature can determine the minimum population required to be a city and hence the minimum population required for the constitutional authority to condemn property.

The classification of cities and towns is found in Utah Code Ann., § 10-2-301,

> The municipalities referred to in this act now existing or hereafter organized shall be divided into cities of the first class, cities of the second class, cities of the third class and towns. Those municipalities having 100,000 or more inhabitants shall be cities of the first class, and those municipalities having 60,000 or more inhabitants and less than 100,000 shall be cities of the second class, those municipalities having 800 or more inhabitants and less than 60,000 shall be cities of the third class and all municipalities having less than 800 inhabitants shall be towns; . . .

Repl. Vol. 2A, Utah Code Annotated (1986) (emphasis added).

The Town has 800 or less inhabitants and therefore must be classified as a "town." The caption in the Complaint filed by the Town also states that it is a town.

B. The Power of Condemnation is Limited.

Article XI, § 5 of the Utah Constitution outlines the power conferred upon cities by the State Constitution. That section provides in part:

> The power to be conferred upon cities by this section shall include the following: . . . (b) to furnish all public services, to purchase, hire, construct, own, maintain or operate, or lease, public utilities local in extent and use; to acquire by condemnation or otherwise, within or without the corporate limits, property necessary for such purposes, subject to restrictions imposed by general law for the protection of other communities; and to grant local public utility franchises and within its powers regulate the exercise thereof.

> (c) to make local public improvements and to acquire by condemnation or otherwise, property within its corporate limits necessary for such improvement; and also to acquire an excess over than [that] needed for any such improvement and to sell or lease such excess property with restrictions, in order to protect and preserve the improvement. . .

Repl. Vol. 1A, Utah Code Annotated (1953) (emphasis added).

The word "town" is not used in this constitutional delineation of the powers of condemnation.

The words "cities" and "towns" are mutually exclusive as used in Article XI, § 5 of the Utah Constitution. At the beginning of that section both words are used, but when the delineation of conferred powers is stated, only the word "cities" is used. Accordingly, if the provisions in the Constitution were to be strictly construed, "towns" could not be included in "cities", nor would the terms be interchangeable, and therefore no power to condemn was conferred upon towns.

The Utah Supreme Court has ruled that the classification of municipalities defines their powers. In City of West Jordan v. Utah State Retirement Board, 767 P.2d 530, (Utah 1988), the Court stated:

> The classification on the basis of population requirement to Article XI, § 5 only applies to laws that classify municipalities for the purpose of defining their powers and functions and directs that if such laws make such distinctions between the powers of various municipalities, those distinctions must be made on the basis of population only.

Id. at 536.

In its Complaint, the Town relies on Utah Code Ann., § 78-34-1 as authority for its power to condemn. The Town does not rely on any constitutional grant of the power to condemn. Because Article XI, § 5 of the Utah Constitution acknowledges a distinction between cities and towns and in fact uses those terms in a mutually exclusive context, the delegation of the power to condemn in the Constitution is limited. Because the Respondent is classified as a town and because towns are not specifically identified in the Constitution, the Town has no power to condemn Broadbent's property. The District Court erred in ruling that the Town of Manila has the authority to condemn.

Point III

THE STATUTORY POWER TO ACQUIRE A FEE SIMPLE INTEREST IN REAL PROPERTY IS LIMITED BY STATUTE TO SPECIFIC PURPOSES AND DOES NOT INCLUDE A SEWAGE LAGOON.

A "municipality" is defined in Utah Code Ann., § 10-16-3(1) as a "city or town of this state." A municipality has the power under § 10-16-4(1)(c) to construct, reconstruct, extend, maintain or repair . . . sewers . . .; and (k) to acquire any property necessary or advisable in order to make any such improvements. Simply because a municipality has the power to acquire property and construct a sewer system does not mean, however, that it has the power to acquire such property by condemnation. The power to condemn property must be derived from a statute which is to be strictly construed. See, C.P. National Corp. v. Public Service Commission, 638 P.2d 519, 523 (Utah 1981), and Bertagnoli v. Baker, 215 P.2d 626 (Utah 1958). This statutory delegation of power is, however, limited by the Constitution and if it does not specifically confer the power, it cannot be inferred or delegated by the legislature.

Utah Code Ann., § 78-34-1 lists the "public uses" for which the power of eminent domain may be exercised, including: ". . . (9) sewerage of any city or town, or of any settlement of not less than 10 families, or of any public building belonging to the state or of any college or university." This grant of eminent domain is limited in § 78-34-2, which outlines the rights in land which may be taken for public use. Section 78-34-2 provides:

> The following is a classification of the estates and rights and lands subject to be taken for public use:
>
> **(1)** A fee simple, when taken for public buildings or grounds or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, mill, smelter or other place for the reduction of ores, or for solar evaporation ponds and other facilities for the recovery of minerals in solution; provided that where surface ground is underlaid with minerals, coal or other extraction, only a perpetual easement may be taken over the surface ground over such deposits.
>
> (2) An easement when taken for any other use.
>
> (3) The right of entry upon, and occupation of lands, with the right to take therefrom such earth, gravel, stones, trees and timber, as may be necessary for some public use.

Utah Code Ann. § 78-34-2 (Repl. Vol. 1987) (Emphasis added).

There is no listing of "sewerage systems" in subparagraph (1) which exhaustively lists those activities allowing for a taking in fee simple. A sewerage system, therefore, is within

subparagraph (2) which limits a taking for any "other" use to an easement.

Paragraph 7 of the Town's Complaint states that it " . . . desires to acquire this property in fee simple . . . ". In fact, the acquisition of fee simple title is a condition of the grant of federal funds for this project.[1] The statute specifically limits the estates which can be taken and the Town can only acquire an easement for this purpose, even if the Constitution extended the power to acquire property by condemnation to towns.

Point IV

THE TOWN HAS FAILED TO SATISFY CONDITIONS PRECEDENT TO CONDEMNATION

A. The Town Failed to Comply With the Statutory Requirements for Condemnation.

Additionally, the Town failed to comply with the statutory requirements for condemnation. Before property can be condemned, the condemnor must demonstrate that:

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[1] 40 CFR 35.935-(3b)(3).

(1) The intended use of land is authorized by law, and

(2) The taking is necessary for that use.

Not only has the Town failed to comply with § 78-34-9, but also, it has failed to meet the conditions precedent to taking as set forth in Utah Code Ann., § 78-34-4. Specifically, the Town has never established that the taking of defendant's land was necessary for the construction of a sewage lagoon, nor that the construction and use of all the property sought to be condemned would commence within a reasonable time after initiation of condemnation proceedings.

In Town of Perry v. Thomas et al., 82 Utah 159, 22 P.2d 343 (1933), the defendants challenged an action brought by a municipal corporation to condemn a private lane for use as a public street. The defendants alleged that no public necessity was shown entitling the plaintiff to an order of temporary possession or judgment of condemnation. On appeal, the Supreme Court ruled that the public necessity for the opening of a street within corporate boundaries was a question for determination by the governing body of a municipality and in the absence of fraud, bad faith or abuse of discretion, would not be disturbed by the courts. Here, the issue presented for review is whether the Town abused its discretion in seeking to condemn land outside of its corporate boundaries for a sewage lagoon.

Other land has been evaluated and is available for use. Building the lagoon on other land would have fewer adverse impacts, be more economical for the town, and could be accomplished without unnecessary delay. While a new waste water treatment facility may be desirable or necessary, there has never been a showing that it is necessary to locate such a facility on Broadbent's land. At least three alternative sites are available and have fewer environmental problems. Furthermore, alternative treatment processes are available which can be implemented at the site of the existing treatment facility and which will not require the acquisition of additional land located outside of the Town's boundaries. Moreover, there is sufficient land within the Town's boundaries on which to build a new sewage lagoon. The availability of other sites within the corporate boundaries and alternative treatment processes is sufficient evidence that the Town's selection of Broadbent's land was arbitrary and subject to careful scrutiny by the trial court.

The trial court had the duty of determining the necessity of the taking and compliance of the statutory requisites, but did not make a full inquiry into these matters and abused its discretion in granting the Order for Immediate Occupancy. See, Salt Lake County v. Ramoselli, 567 P.2d 182 (Utah 1977). In Ramoselli the Utah Supreme Court reversed a trial court's order

of condemnation of land to be used as a park. The Supreme Court found that the trial court had abused its discretion because the plaintiff had not met its burden of proving a public necessity.

Condemnation of Broadbent's land will cause him irreparable harm and the trial court's decision allowing such condemnation must be reversed because there was no showing of necessity or of compliance with the statutory requirements for condemnation.

B. The Town Failed to Comply With the Statutory Requirements for an Order of Immediate Occupancy and the District Court Erred in Granting the Motion.

The Town also failed to comply with Utah Code Ann., § 78-34-9 which prescribes the requisite procedures for obtaining an order of immediate occupancy.

The Town failed to prove in the lower Court by affidavit or otherwise, the damages which would accrue from the condemnation, and the reasons for requiring a speedy occupation of Broadbent's land, all of which is required under the statute. See, Utah Code Ann., § 78-34-9.

Even if the Town has a right to condemn this does not "flow automatically into a right of immediate occupancy; the requisites noted in § 78-34-9 must be met, legally vexing though they may be to a condemnor, before it can prevail in the matter." Utah Department of Transportation v. Hatch, 613 P.2d 764 (Utah 1980). Utah Code Ann., § 78-34-9 directs the court to "grant or refuse the motion [for immediate occupation] according to the equity of the case and the relative damages which may accrue to the parties."

The order of immediate occupancy is analogous to a preliminary injunction. To obtain a preliminary injunction, the moving party must demonstrate a likelihood of prevailing on the merits. The evidence offered by the moving party does not, however, dispense with the need for a trial on the merits. Just as a hearing on a preliminary injunction does not substitute for a trial, neither does the hearing on the order of immediate occupancy dispense with the need for a trial on all of the issues, including, but not limited to the Town's power to condemn. The practical effect of the Order of Immediate Occupancy will be to foreclose Broadbent's ability to challenge the Town's power to condemn extraterritorial property for the sewage lagoon.

C. The Town Failed to Comply With the Utah Relocation Assistance Act.

Approximately fifty-one percent (51%) of the costs of the proposed project will be funded through a federal "design and construction" grant issued by the Environmental Protection Agency. The Utah Relocation Assistance Act ("Act"), Utah Code Ann., §§ 57-12-1 et seq. sets forth specific requirements which must be complied with by state and local governments prior to initiating condemnation proceedings when federal funds are used. Section 57-12-13 of the Act requires that any agency acquiring property by "[e]minent domain or condemnation laws of this state shall comply with the following policies":

> (1) Every reasonable effort shall be made to acquire expeditiously real property by negotiation.
>
> (2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.
>
> (3) Before the initiation of negotiations for real property, an amount shall be established which is reasonably believed to be just compensation, therefore, and such amount shall be offered for the property. In no event shall such amount be less than the lowest approved appraisal of the fair market value of the property. Any decrease or increase of the fair market value of the real property prior to the date of evaluation caused by the public improvement for which such property is acquired or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The owner of the real property to be acquired shall be

provided with a written statement of and summary of the basis for the amount established as just compensation. Where appropriate, the just compensation for real property acquired and for damages to remaining real property shall be separately stated.

(7) In no event shall the time of condemnation be advanced, on negotiations or condemnation and the deposit of funds in court for the use of the owner be deferred, or any other coercive action be taken to compel an agreement on the price to be paid for the property.

(9) If the acquisition of only part of the property would leave its owner with an uneconomic remnant, an offer to acquire the entire property shall be made.

Repl. Vol 2A, Utah Code Annotated (1986) (Emphasis added).

The Complaint is a bare-bones pleading which simply states that the Town seeks to acquire Broadbent's property by condemnation. The Town failed to allege and show that it had complied with the policies of the Act. The Town's Complaint and the testimony at the hearing on the Motion for an Order of Immediate Occupancy, disclose its failure to comply with the Act as follows:

1. The legal description of the property to be condemned is set out in paragraph 3 of the Complaint and contains 35 acres. The "Condemnation Resolution" attached to the complaint refers to an "approved appraisal" of $14,292.00 or a value of approximately $400.00 an acre as stated in the Affidavit of K. C. Nokes. (Record at 6 and

27; also, transcript of hearing on Order of Immediate Occupancy, pages 179-196).

2. Paragraph 6 of the complaint states that the property to be condemned is "[b]ut a part of an entire parcel or tract of the property owned by the defendant . . .". (Record at 2-3, ¶ 6).

3. The appraisal does not recognize any value for damage to the remaining property (severance) caused by the taking. (Record at 11-21; transcript of hearing on Order of Immediate Occupancy, page 43, lines 22-25).

4. Furthermore, a 1,000 foot buffer area will surround the proposed lagoon. The appraisal failed to acknowledge a value for the buffer area. (Record at 36, ¶ 3 and 11-21; transcript of hearing on Order of Immediate Occupancy, page 47, lines 15-25; page 48, lines 1-3; page 191, lines 4-24).

5. Moreover, the property is located adjacent to the Flaming Gorge National Recreation area and the appraisal fails to recognize any diminution in value to the remaining property caused by the project. (Record at 11-21; also,

transcript of hearing on Order of Immediate Occupancy, pages 179-196).

The pleadings establish the Town's failure to comply with the policies of the Act prior to its filing the action for condemnation. The Town's failure to satisfy the conditions precedent to a condemnation deprived the district court of jurisdiction in the matter, and the district court erred in its determination that it had jurisdiction.

Point V

THE TOWN'S RIGHT TO CONDEMN CAN FINALLY BE DETERMINED ONLY AFTER A TRIAL ON THE MERITS.

The proceedings in which the court made its findings was limited to the hearing on the Motion for an Order of Immediate Occupancy. That Motion was granted. An Order of Immediate Occupancy is, however, interlocutory in nature and is not a final appealable order. The Order should not have barred Broadbent from contesting the Town's power to condemn at a trial on the merits. In State v. Denver & Rio Grande Western Railroad Co., 332 P.2d 926 (Utah 1958), the court ruled that an Order of Immediate Occupancy is interlocutory in nature and that the matter of

determining any right to condemn is one for consideration at trial. The Utah Supreme Court later addressed this issue in Utah State Board Com'n v. Friberg, 687 P.2d 821 (Utah 1984) (citations omitted, emphasis added), stating:

> An order of immediate occupancy is entered pendente lite and only authorizes the state to take immediate possession until a final adjudication on the merits. An order of an immediate occupancy is nothing more than an interlocutory order.
>
> The state's right to condemn, if challenged, can finally be determined only after a trial on the merits, not at a hearing on the motion for immediate occupancy. Since an order for immediate occupancy only requires prima facie proof of the right to condemn, that order is not a final adjudication on the merits. Res judicata has no application in the absence of a final adjudication.

At the hearing, Broadbent's counsel specifically reserved the right to challenge the Town's power to condemn at the time of trial and subsequently objected to the evidentiary basis for the court's findings of fact and conclusions of law. Finally, upon Broadbent's motion, the court certified these issues under Rule 54(b) as issues for interlocutory appeal.

The Town argued in the District Court that there had already been an evidentiary hearing in this case. This argument is without merit. The evidence presented in the hearing on the motion for an order of immediate occupancy was a preliminary evidentiary hearing limited solely to respondent's burden of making a prima facie case to substantiate an order of immediate

occupancy. Broadbent's counsel specifically reserved these matters for trial on the merits.

The Town has also argued that the case at bar is distinguishable from Friberg which held that a hearing on an order of immediate occupancy may not be the basis for determining a state's right to condemn and that a full evidentiary hearing is required. Utah State Board Com'n. v. Friberg, 687 P.2d 821 (Utah 1984). See also State v. Denver and Rio Grade Railroad, 8 Utah 20, 236, 238, 332 P.2d 926, 927 (1958) (State's right to condemn can finally be determined only after a trial on the merits, not at a hearing on the Motion for an Order of Immediate Occupancy). The case at bar is not distinguishable from Friberg. Neither in Friberg, nor in the present case was there a full evidentiary hearing. Friberg is clearly on point and governs the present case.

CONCLUSION

For the reasons set forth herein, this Court should reverse the decision of the District Court on the issue of The Town's authority to condemn and remand the case with instructions for a full evidentiary hearing on the conditions precedent to

condemnation and the Town's right to condemn property located outside of its corporate boundaries for a sewage lagoon.

DATED this 2 day of April, 1990.

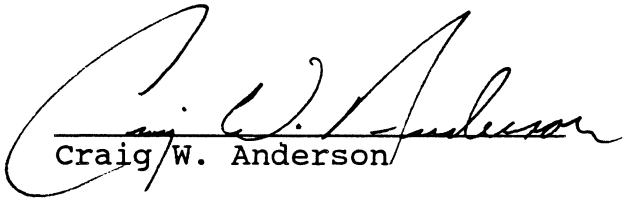
VAN WAGONER & STEVENS

By: _____
Craig W. Anderson
Attorney for Appellant,
Broadbent Land Company

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing **Brief of Appellant** on the 2 day of April, 1990, by placing the same in the United States mail, postage prepaid, addressed to the following:

Clark B. Allred, Esq.
Gayle F. McKeachnie, Esq.
McKEACHNIE, ALLRED & BUNNELL
363 East Main Street
Vernal, Utah 84078



Craig W. Anderson

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APPENDIX

INDEX TO APPENDIX

RESPONSE TO DEFENDANT'S FIRST REQUEST
FOR ADMISSIONS OF FACT TO PLAINTIFF

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF DAGGETT COUNTY

STATE OF UTAH

TOWN OF MANILA, Plaintiff, vs. BROADBENT LAND COMPANY, Defendant.	)	RESPONSE TO DEFENDANT'S FIRST REQUEST FOR ADMISSIONS OF FACT TO PLAINTIFF Civil No. 306B

Request No. 1: Admit that the total containment lagoon site will occupy at least thirty acres of land.

RESPONSE:

Admit.

Request No. 2: Admit that the selected site number 2 is located outside the boundaries of the Town of Manila.

RESPONSE:

Admit.

Request No. 3: Admit that the 30 acre site includes more land than will actually be used for the construction of the treatment cells for the total containment lagoon as currently designed.

RESPONSE:

Admit in the sense that there are lands in addition to the lands under the lagoon itself, which lands are necessary for the

:onstruction, support and operation of the lagoons.

Request No. 4: Admit that the total containment lagoon site ;ill be surrounded by a 1,000 foot "buffer" or "no build" zone.

RESPONSE:

Deny.

Request No. 5: Admit that the Town of Manila must obtain :ights of ways and/or easements for the construction and location)f a pipeline to the total containment lagoon.

RESPONSE:

Admit.

Request No. 6: Admit that the Town of Manila must obtain :ights of ways and/or easements for the construction, operation ind maintenance of the total containment lagoon.

RESPONSE:

Deny. The only easements that will be required will be for :he trunkline.

Request No. 7: Admit that the "Waste Water Facilities Management and Financial Plan Addendum Report" prepared by Palmer-Wilding dated May 1988 list the land acquisition cost in Appendix E (Exhibit "A" attached hereto and incorporated by reference herein) as 30 acres at $2,000 per acre for a total acquisition cost of $60,000.

RESPONSE:

Admit.

Request No. 8: Admit that the land acquisition cost submitted to the EPA in a document entitled "Waste Water

Facilities Financial Information", (Exhibit "B" attached hereto and incorporated by this reference) shows land acquisition costs of $60,000.

RESPONSE:

Admit.

Request No. 9: Admit that the "Water Pollution Control Committee Feasibility Report Waste Water Lagoon and Enhancement Program" (Exhibit "C" attached hereto and incorporated herein by reference) includes a cost for land acquisition of $60,000.

RESPONSE:

Admit.

Request No. 10: Admit that the land acquisition cost estimates prepared for the Town do not include the 1,000 foot "buffer" or "no build area" surrounding the total containment lagoon site.

RESPONSE:

Admit.

DATED this 17 day of October, 1989.

NIELSEN & SENIOR
Attorneys for Plaintiff

By: _____
Clark B. Allred

FILE COPY

:LARK B. ALLRED - 0055
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IN THE EIGHTH JUDICIAL DISTRICT COURT OF DAGGETT COUNTY

STATE OF UTAH

:OWN OF MANILA, Plaintiff, vs. 3ROADBENT LAND COMPANY, Defendant.	)	CERTIFICATE OF SERVICE Civil No. 306B

CERTIFICATE OF SERVICE

I hereby certify that a copy of the RESPONSE TO DEFENDANT'S 'IRST REQUEST FOR ADMISSIONS OF FACT TO PLAINTIFF was served this _____ day of October, 1989, by mailing a true and correct copy :hereof on said date by United States mail, first class, postage)repaid, addressed to:

Mr. Craig Anderson
VAN WAGONER & STEVENS
215 South State Street
Suite 500
Salt Lake City, Utah 84111

DATED this 19 day of October, 1989.

Clark B. Allred

CONSTITUTIONAL PROVISIONS

Article XI, § 5 (b) and (c)

Sec. 5. [Municipal corporations—To be created by general law—Right and manner of adopting charter for own government—Powers included.]

Corporations for municipal purposes shall not be created by special laws. The legislature by general laws shall provide for the incorporation, organization and classification of cities and towns in proportion to population, which laws may be altered, amended or repealed. Any incorporated city or town may frame and adopt a charter for its own government in the following manner:

The legislative authority of the city may, by two-thirds vote of its members, and upon petition of qualified electors to the number of fifteen per cent of all votes cast at the next preceding election for the office of

---

the mayor, shall forthwith provide by ordinance for the submission to the electors of the question: "Shall a commission be chosen to frame a charter?" The ordinance shall require that the question be submitted to the electors at the next regular municipal election. The ballot containing such question shall also contain the names of candidates for members of the proposed commission, but without party designation. Such candidates shall be nominated in the same manner as required by law for nomination of city officers. If a majority of the electors voting on the question of choosing a commission shall vote in the affirmative, then the fifteen candidates receiving a majority of the votes cast at such election, shall constitute the charter commission, and shall proceed to frame a charter.

Any charter so framed shall be submitted to the qualified electors of the city at an election to be held at a time to be determined by the charter commission, which shall be not less than sixty days subsequent to its completion and distribution among the electors and not more than one year from such date. Alternative provisions may also be submitted to be voted upon separately. The commission shall make provisions for the distribution of copies of the proposed charter and of any alternative provisions to the qualified electors of the city, not less than sixty days before the election at which it is voted upon. Such proposed charter and such alternative provisions as are approved by a majority of the electors voting thereon, shall become an organic law of such city at such time as may be fixed therein, and shall supersede any existing charter and all laws affecting the organization and government of such city which are now in conflict therewith. Within thirty days after its approval a copy of such charter as adopted, certified by the mayor and city recorder and authenticated by the seal of such city, shall be made in duplicate and deposited, one in the office of the secretary of State and the other in the office of the city recorder, and thereafter all courts shall take judicial notice of such charter.

Amendments to any such charter may be framed and submitted by a charter commission in the same manner as provided for making of charters, or may be proposed by the legislative authority of the city upon a two-thirds vote thereof, or by petition of qualified electors to a number equal to fifteen per cent of the total votes cast for mayor on the next preceding election, and any such amendment may be submitted at the next regular municipal election, and having been approved by the majority of the electors voting thereon, shall become part of the charter at the time fixed in such amendment and shall be certified and filed as provided in case of charters.

Each city forming its charter under this section shall have, and is hereby granted, the authority to exercise all powers relating to municipal affairs, and to adopt and enforce within its limits, local police, sanitary and similar regulations not in conflict with the general law, and no enumeration of powers in this Constitution or any law shall be deemed to limit or restrict the general grant of authority hereby conferred; but this grant of authority shall not include the power to regulate public utilities, not municipally owned, if any such regulation of public utilities is provided for by general law, nor be deemed to limit or restrict the power of the legislature in matters relating to State affairs, to enact general laws applicable alike to all cities of the State.

The power to be conferred upon the cities by this section shall include the following:

(a) To levy, assess and collect taxes and borrow money, within the limits prescribed by general law, and to levy and collect special assessments for benefits conferred.

(b) To furnish all local public services, to purchase, hire, construct, own, maintain or operate, or lease, public utilities local in extent and use; to acquire by condemnation, or otherwise, within or without the corporate limits, property necessary for any such purposes, subject to restrictions imposed by general law for the protection of other communities; and to grant local public utility franchises and within its powers regulate the exercise thereof.

(c) To make local public improvements and to acquire by condemnation, or otherwise, property within its corporate limits necessary for such improvements; and also to acquire an excess over than [that] needed for any such improvement and to sell or lease such excess property with restrictions, in order to protect and preserve the improvement.

(d) To issue and sell bonds on the security of any such excess property, or of any public utility owned by the city, or of the revenues thereof, or both, including, in the case of public utility, a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate such utility. (As amended November 8, 1932, effective January 1, 1933.)

(d) final orders of the Judicial Conduct Commission;

(e) final orders and decrees in formal adjudicative proceedings originating with:

(i) the Public Service Commission;

(ii) the State Tax Commission;

(iii) the Board of State Lands and Forestry;

(iv) the Board of Oil, Gas, and Mining; or

(v) the state engineer;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction of a first degree or capital felony; and

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

Utah Code Ann., §§ 57-12-1 et. seq.

57-12-1. Short title.

This act shall be known and may be cited as the "Utah Relocation Assistance Act."

57-12-2. Declaration of policy.

It is hereby declared to be the policy of this act and of the state of Utah, and the Legislature recognizes:

(1) That it is often necessary for the various agencies of state and local government to acquire land by condemnation;

(2) That persons, businesses, and farms are often uprooted and displaced by such action while being recompensed only for the value of land taken;

(3) That such displacement often works economic hardship on those least able to suffer the added and uncompensated costs of moving, locating new homes, business sites, farms, and other costs of being relocated;

(4) That such added expenses should reasonably be included as a part of the project cost and paid to those displaced;

(5) That the Congress of the United States has established matching grants for relocation assistance, and has also established uniform policies for land acquisition under the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, to assist the states in meeting these expenses and assuring that land is fairly acquired;

(6) That it is in the public interest for the state of Utah to provide for such payments and to establish such land acquisition policies.

Therefore, the purpose of this act is to establish a uniform policy for the fair and equitable treatment of persons displaced by the acquisition of real property by state and local land acquisition programs, by building code enforcement activities, or by a program of voluntary rehabilitation of buildings or other improvements conducted pursuant to governmental supervision.

All of the provisions of the act shall be liberally construed to put into effect the foregoing policies and purposes.

Utah Code Ann., § 57-12-13

57-12-13. Procedure for acquisition of property.

Any agency acquiring real property as to which it has the power to acquire under the eminent domain or condemnation laws of this state shall comply with the following policies:

(1) Every reasonable effort shall be made to acquire expeditiously real property by negotiation.

(2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.

(3) Before the initiation of negotiations for real property, an amount shall be established which is reasonably believed to be just compensation therefor, and such amount shall be offered for the property. In no event shall such amount be less than the lowest approved appraisal of the fair market value of the property. Any decrease or increase of the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The owner of the real property to be acquired shall be provided with a written statement of, and summary of the basis for, the amount established as just compensation. Where appropriate the just compensation for real property acquired and for damages to remaining real property shall be separately stated.

(4) No owner shall be required to surrender possession of real property acquired through federal or federally assisted programs before the agreed purchase price is paid or there is deposited with a court having jurisdiction of condemnation of such property, in accordance with applicable law, for the benefit of the owner an amount not less than the lowest approved appraisal of the fair market value of such property or the amount of the award of compensation in the condemnation proceeding of such property.

(5) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling will be available) or to move his business or farm operation without at least ninety days' written notice from the date by which such move is required.

(6) If an owner or tenant is permitted to occupy the real property acquired on a rental basis for a short term or for a period subject to termination on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(7) In no event shall the time of condemnation be advanced, on negotiations or condemnation and the deposit of funds in court for the use of the owner be deferred, or any other coercive action be taken to compel an agreement on the price to be paid for the property.

(8) If an interest in real property is to be acquired by exercise of the power of eminent domain, formal condemnation proceedings shall be instituted. The acquiring agency shall not intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only part of the property would leave its owner with an uneconomic remnant, an offer to acquire the entire property shall be made.

Utah Code Ann., § 10-8-15

10-8-15. Waterworks — Construction — Extraterritorial jurisdiction.

They may construct or authorize the construction of waterworks within or without the city limits, and for the purpose of maintaining and protecting the same from injury and the water from pollution their jurisdiction shall extend over the territory occupied by such works, and over all reservoirs, streams, canals, ditches, pipes and drains used in and necessary for the construction, maintenance and operation of the same, and over the stream or source from which the water is taken, for fifteen miles above the point from which it is taken and for a distance of three hundred feet on each side of such stream and over highways along such stream or watercourse within said fifteen miles and said three hundred feet; provided, that the jurisdiction of cities of the first class shall be over the entire watershed, except that livestock shall be permitted to graze beyond one thousand feet from any such stream or source; and provided further, that each city of the first class shall provide a highway in and through its corporate limits, and so far as its jurisdiction extends, which shall not be closed to cattle, horses, sheep or hogs driven through any such city, or through any territory adjacent thereto over which such city has jurisdiction, but the board of commissioners of such city may enact ordinances placing under police regulations the manner of driving such cattle, sheep, horses and hogs through such city, or any territory adjacent thereto over which it has jurisdiction. They may enact all ordinances and regulations necessary to carry the power herein conferred into effect, and are authorized and empowered to enact ordinances preventing pollution or contamination of the streams or watercourses from which the inhabitants of cities derive their water supply, in whole or in part, for domestic and culinary purposes, and may enact ordinances prohibiting or regulating the construction or maintenance of any closet, privy, outhouse or urinal within the area over which the city has jurisdiction, and provide for permits for the construction and maintenance of the same. In granting such permits they may annex thereto such reasonable conditions and requirements for the protection of the public health as they deem proper, and may, if deemed advisable, require that all closets, privies and urinals along such streams shall be provided with effective septic tanks or other germ-destroying instrumentalities.

10-16-4. Powers of municipality.

(1) The governing body of any municipality shall have power to make or cause to be made any one or more or combination of the following improvements:

(a) to establish grades and lay out, establish, open, extend and widen any street, sidewalk, alley or off-street parking facility;

(b) to improve, repair, light, grade, pave, repave, curb, gutter, sewer, drain, park and beautify any street, sidewalk, alley or off-street parking facility;

(c) to construct, reconstruct, extend, maintain or repair bridges, sidewalks, crosswalks, driveways, culverts, sewers, storm sewers, drains, flood barriers and channels; and to construct, reconstruct, extend, maintain, or repair lines, facilities and equipment (other than generating equipment) for street lighting purposes or for the expansion or improvement of a previously established municipally owned electrical distribution system, to a district within the boundaries of the municipality;

(d) to plant or cause to be planted, set out, cultivate and maintain lawns, shade trees or other landscaping;

(e) to cover, fence, safeguard or enclose reservoirs, canals, ditches and watercourses and to construct, reconstruct, extend, maintain and repair waterworks, reservoirs, canals, ditches, pipes, mains, hydrants, and other water facilities for the purpose of supplying water for domestic and irrigation purposes or either, regulating, controlling or distributing the same and regulating and controlling water and watercourses leading into the municipality;

(f) to acquire, construct, reconstruct, extend, maintain or repair parking lots or other facilities for the parking of vehicles off streets;

(g) to acquire, construct, reconstruct, extend, maintain or repair any of the improvements authorized in this section for use in connection with an industrial or research park except that this act may not be used to pay the cost of buildings or structures used for industry or research;

(h) to acquire, construct, reconstruct, extend, maintain or repair parks and other recreational facilities;

(i) to remove any nonconforming existing improvements in the areas to be improved;

(j) to construct, reconstruct, extend, maintain or repair optional improvements;

(k) to acquire any property necessary or advisable in order to make any of such improvements;

(l) to make any other improvements now or hereafter authorized by any other law, the cost of which in whole or in part can properly be determined to be of particular benefit to a particular area within the municipality;

(m) to construct and install all such structures, equipment and other items and to do all such other work as may be necessary or appropriate to complete any of such improvements in a proper manner.

(2) For the purpose of making and paying for all or a part of the cost of any of such improvements (including optional improvements), the governing body of a municipality may create special improvement districts within the municipality, levy assessments on the property within such a district which is benefited by the making of the improvements and issue interim warrants and special improvement bonds as provided in this act.

Utah Code Ann., §§ 78-34-1 et. seq.

78-34-1. Uses for which right may be exercised.

Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

(1) all public uses authorized by the Government of the United States.

(2) public buildings and grounds for the use of the state, and all other public uses authorized by the Legislature.

(3) public buildings and grounds for the use of any county, city or incorporated town, or board of education; reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county or city or incorporated town, or for the draining of any county, city or incorporated town; the raising of the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels; roads, streets and alleys; and all other public uses for the benefit of any county, city or incorporated town, or the inhabitants thereof.

(4) wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging or lumbering purposes, and railroads and street railways for public transportation.

(5) reservoirs, dams, watergates, canals, ditches, flumes, tunnels, aqueducts and pipes for the supplying of persons, mines, mills, smelters or other works for the reduction of ores, with water for domestic or other uses, or for irrigation purposes, or for the draining and reclaiming of lands, or for the floating of logs and lumber on streams not navigable, or for solar evaporation ponds and other facilities for the recovery of minerals in solution.

(6) roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines, quarries, coal mines or mineral deposits including minerals in solution; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse or water from mills, smelters or other works for the reduction of ores, or from mines, quarries, coal mines or mineral deposits including minerals in solution; mill dams; gas, oil or coal pipelines, tanks or reservoirs, including any subsurface stratum or formation in any land for the underground storage of natural gas, and in connection therewith such other interests in property as may be required adequately to examine, prepare, maintain, and operate such underground natural gas storage facilities; and solar evaporation ponds and other facilities for the recovery of minerals in solution; also any occupancy in common by the owners or possessors of different mines, quarries, coal mines, mineral deposits, mills, smelters, or other places for the reduction of ores, or any place for the flow, deposit or conduct of tailings or refuse matter.

(7) byroads leading from highways to residences and farms.

(8) telegraph, telephone, electric light and electric power lines, and sites for electric light and power plants.

(9) sewerage of any city or town, or of any settlement of not less than ten families, or of any public building belonging to the state, or of any college or university.

(10) canals, reservoirs, dams, ditches, flumes, aqueducts and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light or heat.

(11) cemeteries and public parks.

(12) pipe lines for the purpose of conducting any and all liquids connected with the manufacture of beet sugar.

(13) sites for mills, smelters or other works for the reduction of ores and necessary to the successful operation thereof, including the right to take lands for the discharge and natural distribution of smoke, fumes and dust therefrom, produced by the operation of such works; provided, that the powers granted by this subdivision shall not be exercised in any county where the population exceeds twenty thousand, or within one mile of the limits of any city or incorporated town; nor unless the proposed condemner has the right to operate by purchase, option to purchase or easement, at least seventy-five per cent in value of land acreage owned by persons or corporations situated within a radius of four miles from the mill, smelter or other works for the reduction of ores; nor beyond the limits of said four-mile radius; nor as to lands covered by contracts, easements or agreements existing between the condemner and the owner of land within said limit and providing for the operation of such mill, smelter or other works for the reduction of ores; nor until an action shall have been commenced to restrain the operation of such mill, smelter or other works for the reduction of ores.

CLASSIFICATION OF MUNICIPALITIES

10-2-301. Classification of municipalities according to population.

The municipalities referred to in this act now existing or hereafter organized shall be divided into cities of the first class, cities of the second class, cities of the third class and towns. Those municipalities having 100,000 or more inhabitants shall be cities of the first class, and those municipalities having 60,000 or more inhabitants and less than 100,000 shall be cities of the second class, those municipalities having 800 or more inhabitants but less than 60,000 shall be cities of the third class and all municipalities having less than 800 inhabitants shall be towns; but this section shall not lower the class of any municipality which now exists.

Utah Code Ann., § 10-16-3(1)

10-16-3. Definitions.

As used in this chapter:

(1) "Municipality" means a city or town of this state.

(2) "Governing body" means the board of commissioners or city council of a city or the town council of a town.

(3) "Special improvement district" or "district" means a district created for the purpose of making improvements under this chapter.

(4) "Assessment" means a special tax levied against property within a special improvement district to pay all or a portion of the costs of making improvements in the district.

(5) "Bonds" or "special improvement bonds" mean bonds issued under this chapter payable from assessments and out of the special improvement guaranty fund established as provided in this chapter.

(6) "Property" means real property or any interest in real property.

(7) "Contract price" means the amount payable to one or more contractors for the making of improvements in a special improvement district under any contract duly let to the lowest responsible bidder or bidders as required by this chapter, including amounts payable for extra or addi-

Utah Code Ann., § 10-16-4(1)(c)

10-16-4. Powers of municipality.

(1) The governing body of any municipality shall have power to make or cause to be made any one or more or combination of the following improvements:

(a) to establish grades and lay out, establish, open, extend and widen any street, sidewalk, alley or off-street parking facility;

(b) to improve, repair, light, grade, pave, repave, curb, gutter, sewer, drain, park and beautify any street, sidewalk, alley or off-street parking facility;

(c) to construct, reconstruct, extend, maintain or repair bridges, sidewalks, crosswalks, driveways, culverts, sewers, storm sewers, drains, flood barriers and channels; and to construct, reconstruct, extend, maintain, or repair lines, facilities and equipment (other than generating equipment) for street lighting purposes or for the expansion or improvement of a previously established municipally owned electrical distribution system, to a district within the boundaries of the municipality;

Utah Code Ann., § 10-16-4(1)(k)

10-16-4. Powers of municipality.

(1) The governing body of any municipality shall have power to make or cause to be made any one or more or combination of the following improvements:

(a) to establish grades and lay out, establish, open, extend and widen any street, sidewalk, alley or off-street parking facility;

(b) to improve, repair, light, grade, pave, repave, curb, gutter, sewer, drain, park and beautify any street, sidewalk, alley or off-street parking facility;

(c) to construct, reconstruct, extend, maintain or repair bridges, sidewalks, crosswalks, driveways, culverts, sewers, storm sewers, drains, flood barriers and channels; and to construct, reconstruct, extend, maintain, or repair lines, facilities and equipment (other than generating equipment) for street lighting purposes or for the expansion or improvement of a previously established municipally owned electrical distribution system, to a district within the boundaries of the municipality;

(d) to plant or cause to be planted, set out, cultivate and maintain lawns, shade trees or other landscaping;

(e) to cover, fence, safeguard or enclose reservoirs, canals, ditches and watercourses and to construct, reconstruct, extend, maintain and repair waterworks, reservoirs, canals, ditches, pipes, mains, hydrants, and other water facilities for the purpose of supplying water for domestic and irrigation purposes or either, regulating, controlling or distributing the same and regulating and controlling water and watercourses leading into the municipality;

(f) to acquire, construct, reconstruct, extend, maintain or repair parking lots or other facilities for the parking of vehicles off streets;

(g) to acquire, construct, reconstruct, extend, maintain or repair any of the improvements authorized in this section for use in connection with an industrial or research park except that this act may not be used to pay the cost of buildings or structures used for industry or research;

(h) to acquire, construct, reconstruct, extend, maintain or repair parks and other recreational facilities;

(i) to remove any nonconforming existing improvements in the areas to be improved;

(j) to construct, reconstruct, extend, maintain or repair optional improvements;

(k) to acquire any property necessary or advisable in order to make any of such improvements;

(l) to make any other improvements now or hereafter authorized by any other law, the cost of which in whole or in part can properly be determined to be of particular benefit to a particular area within the municipality;

(m) to construct and install all such structures, equipment and other items and to do all such other work as may be necessary or appropriate to complete any of such improvements in a proper manner.

(2) For the purpose of making and paying for all or a part of the cost of any of such improvements (including optional improvements), the governing body of a municipality may create special improvement districts within the municipality, levy assessments on the property within such a district which is benefited by the making of the improvements and issue interim warrants and special improvement bonds as provided in this act.

Utah Code Ann., § 78-34-2

78-34-2. Estates and rights that may be taken.

The following is a classification of the estates and rights in lands subject to be taken for public use:

(1) a fee simple, when taken for public buildings or grounds or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, mill, smelter or other place for the reduction of ores, or for solar evaporation ponds and other facilities for the recovery of minerals in solution; provided that where surface ground is underlaid with minerals, coal or other deposits sufficiently valuable to justify extraction, only a perpetual easement may be taken over the surface ground over such deposits.

(2) an easement, when taken for any other use.

(3) the right of entry upon, and occupation of lands, with the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use.

Utah Code Ann., § 78-34-1(9)

county, city or incorporated town; the raising of the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels; roads, streets and alleys; and all other public uses for the benefit of any county, city or incorporated town, or the inhabitants thereof.

(4) wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging or lumbering purposes, and railroads and street railways for public transportation.

(5) reservoirs, dams, watergates, canals, ditches, flumes, tunnels, aqueducts and pipes for the supplying of persons, mines, mills, smelters or other works for the reduction of ores, with water for domestic or other uses, or for irrigation purposes, or for the draining and reclaiming of lands, or for the floating of logs and lumber on streams not navigable, or for solar evaporation ponds and other facilities for the recovery of minerals in solution.

(6) roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines, quarries, coal mines or mineral deposits including minerals in solution; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse or water from mills, smelters or other works for the reduction of ores, or from mines, quarries, coal mines or mineral deposits including minerals in solution; mill dams; gas, oil or coal pipelines, tanks or reservoirs, including any subsurface stratum or formation in any land for the underground storage of natural gas, and in connection therewith such other interests in property as may be required adequately to examine, prepare, maintain, and operate such underground natural gas storage facilities; and solar evaporation ponds and other facilities for the recovery of minerals in solution; also any occupancy in common by the owners or possessors of different mines, quarries, coal mines, mineral deposits, mills, smelters, or other places for the reduction of ores, or any place for the flow, deposit or conduct of tailings or refuse matter.

(7) byroads leading from highways to residences and farms.

(8) telegraph, telephone, electric light and electric power lines, and sites for electric light and power plants.

(9) sewerage of any city or town, or of any settlement of not less than ten families, or of any public building belonging to the state, or of any college or university.

Utah Code Ann., § 78-34-4

78-34-4. Conditions precedent to taking.

Before property can be taken it must appear:

(1) that the use to which it is to be applied is a use authorized by law;

(2) that the taking is necessary to such use;

(3) that construction and use of all property sought to be condemned will commence within a reasonable time as determined by the court, after the initiation of proceedings under this chapter; and

(4) if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

Utah Code Ann., § 78-34-9

78-34-9. Occupancy of premises pending action — Deposit paid into court — Procedure for payment of compensation.

The plaintiff may move the court or a judge thereof, at any time after the commencement of suit, on notice to the defendant, if he is a resident of the state, or has appeared by attorney in the action, otherwise by serving a notice directed to him on the clerk of the court, for an order permitting the plaintiff to occupy the premises sought to be condemned pending the action, including appeal, and to do such work thereon as may be required. The court or a judge thereof shall take proof by affidavit or otherwise of the value of the premises sought to be condemned and of the damages which will accrue from the condemnation, and of the reasons for requiring a speedy occupation, and shall grant or refuse the motion according to the equity of the case and the relative damages which may accrue to the parties. If the motion is granted, the court or judge shall enter its order requiring the plaintiff as a condition precedent to occupancy to file with the clerk of the court a sum equivalent to at least 75/% of the condemning authority's appraised valuation of the property sought to be condemned. The amount thus fixed shall be for the purposes of the motion only, and shall not be admissible in evidence on final hearing. The rights of the just compensation for the land so taken or damaged shall vest in the parties entitled thereto, and said compensation shall be ascertained and awarded as provided in § 78-34-10 and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 8/% per annum on the amount finally awarded as the value of the property and damages, from the date of taking actual possession thereof by the plaintiff or order of occupancy, whichever is earlier, to the date of judgment; but interest shall not be allowed on so much thereof as shall have been paid into court. Upon the application of the parties in interest, the court shall order the money deposited in the court be paid forthwith for or on account of the just compensation to be awarded in the proceeding. A payment to a defendant as aforesaid shall be held to be an abandonment by such defendant of all defenses excepting his claim for greater compensation. If the compensation finally awarded in respect of such lands, or any parcel thereof, shall exceed the amount of the money so received the court shall enter judgment against the plaintiff for the amount of the deficiency. If the amount of money so received by the defendant is greater than the amount finally awarded, the court shall enter judgment against the defendant for the amount of the excess. Upon the filing of the petition for immediate occupancy the court shall fix the time within which, and the terms upon which, the parties in possession shall be required to surrender possession to the plaintiff. The court shall make such orders in respect to encumbrances, liens, rents, assessments, insurance and other charges, if any, as shall be just and equitable.

UTAH RULES OF CIVIL PROCEDURE

Rule 54(b)

Rule 54. Judgments; costs.

(a) **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) **Judgment upon multiple claims and/or involving multiple parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

RULES OF THE UTAH SUPREME COURT

Rule 3(a)

Rule 3. Appeal as of right: How taken.

(a) **Filing appeal from final orders and judgments.** An appeal may be taken from a district court to the Supreme Court from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney's fees.

(b) **Joint or consolidated appeals.** If two or more parties are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in an appeal of another party after filing separate timely notices of appeal. Such joint appeals may thereafter proceed and be treated as a single appeal with a single appellant. Individual appeals may be consolidated by order of the Supreme Court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) **Designation of parties.** The party taking the appeal shall be known as the appellant and the adverse party as the respondent. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the Supreme Court. In original proceedings in the Supreme Court the party making the original application shall be known as the plaintiff and any other party as the defendant.

(d) **Content of notice of appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall name the court from which the appeal is taken; and shall designate that the appeal is taken to the Supreme Court.

(e) **Service of notice of appeal.** The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the party is not represented by counsel, then on the party at his last known address.

(f) **Filing and docketing fees in civil appeals.** At the time of filing any separate or joint notice of appeal in a civil case, the party taking the appeal shall pay to the clerk of the district court such filing fees as are established by law, and also the fee for docketing the appeal in the Supreme Court. The clerk of the district court shall not accept a notice of appeal unless the filing and docketing fees are paid.

(g) **Docketing of appeal.** Upon the filing of the notice of appeal and payment of the required fees, the clerk of the district court shall forthwith transmit one copy of the notice of appeal, showing the date of its filing, together with the docketing fee, to the clerk of the Supreme Court. Upon receipt of the copy of the notice of appeal and the docketing fee, the clerk of the Supreme Court shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, such name shall be added to the title.

RULES OF THE UTAH SUPREME COURT

Rule 4

Rule 4. Appeal as of right: When taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the district court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; provided however, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the district court by any party: (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the district court by any party: (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the district court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in Paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment or order but before the entry of the judgment or order of the district court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by Paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by Paragraph (a) of this rule. Any such motion which is filed before expiration of the prescribed time may be ex parte unless the district court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with the district court rules of practice. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

40 CFR 35.935-(3b) (3)

(d) The Regional Administrator may include special conditions in the grant or administer this subpart in the manner which he determines most appropriate to coordinate with, restate, or enforce NPDES permit terms and schedules.

§ 35.935-2 Procurement.

The grantee and party to any subagreement must comply with the applicable provisions of §§ 35.935 through 35.939 with respect to procurement for step 1, 2, or 3 work. The Regional Administrator will cause appropriate review of grantee procurement to be made.

§ 35.935-3 Property.

(a) The grantee must comply with the property provisions of § 30.810 et seq. of this subchapter with respect to all property (real and personal) acquired with project funds.

(b) With respect to real property (including easements) acquired in connection with the project, whether such property is acquired with or in anticipation of EPA grant assistance or solely with funds furnished by the grantee or others:

(1) The acquisition must be conducted in accordance with Part 4 of this chapter;

(2) Any displacement of a person by or as a result of any acquisition of the real property shall be conducted under the applicable provisions of Part 4 of this chapter; and

(3) The grantee must obtain (before initiation of step 3 construction), and must thereafter retain, a fee simple or such estate or interest in the site of a step 3 project, and rights of access, as the Regional Administrator finds sufficient to assure undisturbed use and possession for the purpose of construction and operation for the estimated life of the project. If a step 3 project serves more than one municipality, the grantee must insure that the participating municipalities have, or will have before the initiation of step 3 construction, such interests or rights in land as the Regional Administrator finds sufficient to assure their undisturbed utilization of the project site for the estimated life of the project.

(c) With respect to real property acquired with EPA grant assistance, the grantee must defer acquisition of such property until approval of the Regional Administrator is obtained under § 35.940-3.

§ 35.935-4 Step 2+3 projects.

A grantee which has received step 2+3 grant assistance must make submittals required by § 35.920-3(c), together with approvable user charge and industrial cost recovery systems and a preliminary plan of operation. The Regional Administrator shall give written approval of these submittals before advertising for bids on the step 3 construction portion of the step 2+3 project. The cost of step 3 work initiated before such approval is not allowable. Failure to make the above submittals as required is cause for invoking sanctions under § 35.965.

§ 35.935-5 Davis-Bacon and related statutes.

Before soliciting bids or proposals for step 3-type work, the grantee must consult with the Regional Administrator concerning compliance with Davis-Bacon and other statutes referenced in § 30.415 et seq. of this subchapter.

§ 35.935-6 Equal employment opportunity.

Contracts involving step 3-type work of $10,000 or more are subject to equal employment opportunity requirements under Executive Order 11246 (see Part 8 of this chapter). The grantee must consult with the Regional Administrator about equal employment opportunity requirements before issuance of an invitation for bids where the cost of construction work is estimated to be more than $1 million or where required by the grant agreement.

§ 35.935-7 Access.

The grantee must insure that EPA and State representatives will have access to the project work whenever it is in preparation or progress. The grantee must provide proper facilities for access and inspection. The grantee must allow the Regional Administrator, the Comptroller General of the United States, the State agency, or

Vicky McKee Deputy
Daggett County Clerk

VAN WAGONER & STEVENS
LEWIS T. STEVENS (A3104)
CRAIG W. ANDERSON (A0078)
215 South State Street
Suite 500
Salt Lake City, Utah 84111
Telephone: (801) 532-1036

Attorneys for Defendant

FILE COPY

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DAGGETT COUNTY

STATE OF UTAH

TOWN OF MANILA Plaintiff, v. BROADBENT LAND COMPANY Defendant.	ORDER GRANTING DEFENDANT'S MOTION TO CERTIFY RULING DENYING MOTION TO DISMISS AS A FINAL APPEALABLE ORDER Civil No. CV306B Judge Dennis L. Draney

Based upon Defendant, Broadbent Land Company's Motion for an Order Certifying the Court's Ruling dated September 8, 1989, and Order striking defendant's affirmative defenses and dismissing the first cause of action of its counterclaim; the Findings and Order denying defendant's Motion to Dismiss; the Findings and Order granting plaintiff's Motion for an Order of Immediate Occupancy; and after reviewing the Memoranda and Points and Authorities submitted by counsel for the parties and being fully advised therein;

EXHIBIT "E"

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, there is no just reason for delaying its appeal and, therefore, defendant, Broadbent Land Company's Motion to Certify be and hereby is granted and that the following Rulings and Judgments are final appealable Judgments and Orders as provided for in Rule 3(a) of the Rules of the Utah Supreme Court:

1. The Court's Ruling dated September 8, 1989, and subsequent Order striking defendant's affirmative defenses 3 through 7 and dismissing the first cause of action of its counterclaim.
2. The Findings and Order denying defendant's Motion to Dismiss dated July 12, 1989.
3. The Findings and Order entered by the Court granting plaintiff's Motion for an Order of Immediate Occupancy dated July 12, 1989.

DATED this 5th day of December, 1989.

BY THE COURT

Dennis L. Draney
District Court Judge

501.BDB

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GAYLE F. McKEACHNIE - 2200
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Attorneys for Plaintiff
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Vernal, Utah 84078
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IN THE EIGHTH JUDICIAL DISTRICT COURT OF DAGGETT COUNTY

STATE OF UTAH

TOWN OF MANILA, Plaintiff, vs. BROADBENT LAND COMPANY, Defendant.	FINDINGS IN SUPPORT OF GRANTING ORDER OF IMMEDIATE OCCUPANCY Civil No. 306B

The above captioned matter having come before the Court on June 29, 1989 pursuant to Plaintiff's Motion and the Court's Order to Show Cause regarding the issuance of an Order of Immediate Occupancy. Plaintiff was represented by its attorneys, Clark B. Allred and Gayle F. McKeachnie. Defendant was represented by its attorney, Craig W. Anderson. Witnesses were called and testimony was received. The Court also received legal Memoranda and oral argument from counsel regarding the issues. The Court hereby makes the following Findings

FINDINGS

1. Before the Court can grant the request for an Order of Immediate Occupancy the Plaintiff must prove that the conditions of Utah Code Ann. §78-34-4 and §38-34-9 have been met.

2. §38-4-4(1) has been complied with in that Utah law, including Utah Code Ann. §10-8-14, §10-8-38 and §10-16-4

EXHIBIT "C"

authorize the construction of wastewater treatment systems by towns.

3. Utah Code Ann. §78-34-4(2) has been complied with and the evidence shows that it was necessary for the town to construct a new wastewater treatment facility. The present system of the Town of Manila is failing and needs to be replaced. The specific details of the problems with the present system are set forth in Exhibit 10, at page 2.

4. The property that Plaintiff seeks to condemn is necessary for the installation of the wastewater treatment facility. It is not necessary that the Plaintiff nor the Court find that the town has selected, the best or only alternative site. The facts show that the site selected by the town, is a result of careful, significant studies by its engineers, which studies have been reviewed and approved by both the state and federal government. There is no showing that the town's selection of the site nor the system it proposes to be used has been a result of fraud, bad faith or abuse of discretion, but rather has been based on substantial studies and is reasonable.

5. Utah Code Ann. §78-34-4(3) has been complied with in that the facility's plans have been completed, funding has been granted and Plaintiff plans to immediately enter upon the property and start design work. Upon gaining access to the property it anticipates the design work will completed within two to four months and that construction work will immediately begin

and be completed within six months.

6. Utah Code Ann. §78-34-4(4) is inapplicable to this factual situation.

7. The requirements of Utah Code Ann. §78-34-9 have been met. The facts showed that Plaintiff needs immediate occupancy of the property to proceed with design engineering and construction of the project. Plaintiff has available funding for the project through a grant and an interest free loan. One deadline has passed on those funds and the other deadline is rapidly approaching. Those funds are still available as a result of the good graces of the government entities granting those funds, but continued delay will jeopardized those funds. Furthermore, the present system is a threat to public health, is violating the discharge permit and needs to be replaced.

8. The testimony of Defendant's expert, Mr. Oakey, was helpful to the Court, including information that the proposed project is reasonable.

9. The Plaintiff's appraisal values the property at $14,000.00. 75% of that amount is $10,500.00.

DATED this 12th day of July, 1989.

Dennis L. Draney
District Judge

MAILING CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UINTAH)

JuNae Cook, being duly sworn, says:

That she is employed in the office of NIELSEN & SENIOR, Clark B. Allred, attorneys for Plaintiff, herein, that she served the attached FINDINGS IN SUPPORT OF GRANTING ORDER OF IMMEDIATE OCCUPANCY upon counsel by sending a true and correct copy thereon in an envelope addressed to:

Mr. Craig W. Anderson
VAN WAGONER & STEVENS
215 South State Street
Suite 500
Salt Lake City, Utah 84111

and deposited the same, sealed, with first class postage prepaid thereon, in the United States mail at Vernal, Utah on the 11 day of July, 1989.

JuNae Cook
JuNae Cook

Subscribed and sworn to before me this 11th day of July, 1989.

Mary M Chapman
Notary Public
Residing at Vernal, Utah

My commission expires:
April 18, 1990

CLARK B. ALLRED - 0055
GAYLE F. McKEACHNIE - 2200
NIELSEN & SENIOR
Attorneys for Plaintiff
363 East Main Street
Vernal, Utah 84078
Telephone: (801) 789-4908

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DAGGETT COUNTY

STATE OF UTAH

TOWN OF MANILA, Plaintiff, vs. BROADBENT LAND COMPANY, Defendant.	)	FINDINGS AND ORDER DENYING MOTION TO DISMISS Civil No. 306B

This matter having come before the Court pursuant to Defendant's Motion to Dismiss Plaintiff's Complaint dated June 26, 1989. The Court heard oral argument on the legal issues set forth in the Motion and also received evidence regarding compliance with the Utah Relocation Assistance Act, Utah Code Ann. §57-12-1. The Court being fully advised makes the following Findings.

FINDINGS

1. Defendant has not given to the Court sufficient reasons, either legal or factual, why the Plaintiff does not have power to condemn. The constitutional and statutory provisions cited by the Defendant do not prevent the town from having condemnation powers. The Eminent Domain statute, §78-34-1, et. seq., specifically provides that towns do have eminent domain

EXHIBIT "B"

powers for sewer systems. To prevent the town from condemning would be in conflict to the obligations and duties placed on towns to provide for the health and safety of its citizens and town's authority to provide wastewater systems for its citizens.

2. The language in §78-34-2 regarding the power to condemn fee simple title for public grounds and reservoirs is sufficiently broad to allow the Town of Manila to condemn, in fee simple, the property upon which it seeks to build its wastewater treatment lagoons.

3. J.R. Broadbent, the managing partner of the Defendant, has known of the proposal of the town to construct a new sewer lagoon system since its inception. He was contacted at the beginning by engineers seeking authority to go on his property to dig test pits, percolation pits and otherwise determine the feasibility of various sites. When the engineers had selected the site numerous attempts were made by the town, through its agents, to contact the Defendant and to negotiate the purchase of the property. Defendant has been or has had every reasonable opportunity to be fully acquainted with the process since the beginning and to be fully aware of the project and the steps that have been taken.

4. J.R. Broadbent has been invited to go on the property with agents of the Plaintiff. An appraisal was done. J.R. Broadbent was aware of the appraisal, the amount of the appraisal and discussed the appraisal with agents of Manila Town indicating that he did not consider it to be high enough.

5. J.R. Broadbent's insistence in all contacts, either by Mr. Broadbent or his attorneys, with agents of Plaintiff was that the lagoons be built on a different site. He refused to discuss the question of price.

6. All the purposes of the Relocation Assistance Act have been met by the Plaintiff. It would have been futile by Plaintiff to take any other steps regarding appraisals or negotiation of value due to Defendant's refusal to discuss those issues with the Plaintiffs or even to meet with and discuss with the Plaintiff the acquisition of the property.

7. Plaintiff has substantially complied with the terms of the Relocation Assistance Act and have done all things required by the Act which Defendant would allow it to do.

The Court having made the above Findings, hereby;

ORDERS, ADJUDGES AND DECREES that Defendant's Motion to Dismiss Plaintiff's Complaint is denied.

DATED this 12th day of July, 1989.

Dennis L. Draney
Dennis L. Draney
District Judge

MAILING CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UINTAH)

JuNae Cook, being duly sworn, says:

That she is employed in the office of NIELSEN & SENIOR, Clark B. Allred, attorneys for Plaintiff, herein, that she served the attached FINDINGS AND ORDER DENYING MOTION TO DISMISS upon counsel by sending a true and correct copy thereon in an envelope addressed to:

Mr. Craig W. Anderson
VAN WAGONER & STEVENS
215 South State Street
Suite 500
Salt Lake City, Utah 84111

and deposited the same, sealed, with first class postage prepaid thereon, in the United States mail at Vernal, Utah on the 11 day of July, 1989.

JuNae Cook

Subscribed and sworn to before me this 11th day of July, 1989.

Notary Public
Residing at Vernal, Utah

My commission expires:
April 18, 1990

CLARK B. ALLRED - 0055
GAYLE F. McKEACHNIE - 2200
NIELSEN & SENIOR
Attorneys for Plaintiff
363 East Main Street
Vernal, Utah 84078
Telephone: (801) 789-4908

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DAGGETT COUNTY

STATE OF UTAH

TOWN OF MANILA, Plaintiff, vs. BROADBENT LAND COMPANY, Defendant.	)	ORDER Civil No. CV306B

The above captioned matter came before the Court pursuant to Plaintiff's Motion to Dismiss and to Strike and Defendant's Motion to Strike Plaintiff's Reply Memorandum. The Court having reviewed the Motions, the Memoranda and being fully advised, hereby;

ORDERS as follows:

1. Defendant's Motion to Strike is denied. Defendant has not shown any prejudice was caused by the delay in filing the response.

2. Plaintiff's Motion to Dismiss and to Strike is granted. The Court held an Evidentiary Hearing, received legal Memoranda from the parties and has ruled upon the issues presented in the First Cause of Action in Defendant's Counterclaim and the Third, Fourth, Fifth and Sixth Affirmative Defenses in the Amended

EXHIBIT "A"

Answer. The Court intended that Order to be dispositive of those issues.

3. It is hereby Ordered that the First Cause of Action in Defendant's Counterclaim is dismissed and the Third Affirmative Defense, Fourth Affirmative Defense, Fifth Affirmative Defense and Sixth Affirmative Defense in Defendant's Amended Answer are hereby stricken.

DATED this 26 day of September, 1989.

Dennis L. Draney
District Judge

MAILING CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UINTAH)

JuNae Cook, being duly sworn, says:

That she is employed in the office of NIELSEN & SENIOR, Clark B. Allred, attorneys for Plaintiff, herein, that she served the attached ORDER upon counsel by sending a true and correct copy thereon in an envelope addressed to:

Mr. Craig W. Anderson
VAN WAGONER & STEVENS
215 South State Street
Suite 500
Salt Lake City, Utah 84111

and deposited the same, sealed, with first class postage prepaid thereon, in the United States mail at Vernal, Utah on the 15 day of September, 1989.

JuNae Cook

Subscribed and sworn to before me this day of September, 1989.

Notary Public
Residing at Vernal, Utah

My commission expires:

4-30-90